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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 429 - 430

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Petitioners,

vs.

INLAND STEEL COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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No.

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Petitioners,

vs.

INLAND STEEL COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Foreman M. Lebold and Samuel N. Lebold, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered by that court July 29, 1943,[1] arbitrarily reducing by a round $1,000 per share the amount which the District Court had found was the value, on May 1, 1936, of petitioner's 295 shares of stock of Inland Steamship Company.[2]

May 1, 1936, was the date on which respondent, adjudi-

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1. *Nunc pro tunc* as of July 16, 1943 (R. 225).

2. Hereafter referred to as Steamship Company; respondent will be sometimes referred to as Steel Company.

cated on a prior appeal to be a faithless trustee,[3] acquired the assets of the Steamship Company for a consideration adjudicated to be inadequate,[4] at dissolution sale which was the final step of respondent's fraudulent scheme to "get rid of the minority interest and take over the assets and business of the Steamship Company".[5]

This action was instituted to compel payment to petitioners of the difference between what they received as the result of the fraudulent dissolution and the full value of their stock considered as stock in a going prosperous concern. December 29, 1941, the court below held petitioners entitled to this relief and remanded the cause to the District Court to find the value on that basis.[6] That court found the value to be $2,350 per share, and entered judgment accordingly (R. 144). The court below reversed, found the value to be $1,350, and entered judgment accordingly (R. 225). Both courts allowed interest.

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3. *Lebold* v. *Inland Steel Co.*, 125 F. (2d) 369, 372; certiorari denied, 316 U. S. 675.

4. *Lebold* v. *Inland Steamship Co.*, 7 Cir. 82 F. (2d) 351, 356; *Lebold* v. *Inland Steel Co.*, 125 F. (2d) 372, 374.

5. 125 F. (2d) 369, 372.

6. 125 F. (2d) 369 (R. 2).

STATEMENT.

Petitioners owned 295 out of the 1,600 issued shares of the capital stock of Inland Steamship Company (O. R. 196),[7] a West Virginia corporation organized in 1911 for the authorized purpose of engaging in the business of carrying bulk freight on the Great Lakes (O. R. 138). In fact, the principal purpose was to carry such freight for respondent; and throughout its existence the Steamship Company was engaged almost exclusively in carrying ore, coal and limestone from Great Lakes ports to the Steel Company's plant at the south end of Lake Michigan (O. R. 197).

Respondent, the original subscriber for 67% of the Steamship Company's capital stock, acquired in 1935, and until dissolution owned, an additional 13% (O. R. 196). Respondent at all times actively controlled the policies and administration of the Steamship Company. The company, extremely successful, never incurred a loss, paid dividends every year from 1914 through 1935, with the single exception of 1932, the lowest of the depression years. Dividends for 1930, 1931, and 1933 through 1935, were at the rate of $150 per share (Pltfs. Exs. D-2, R. 101, 37).

With a greedy eye on the "golden stream" thus going to minority stockholders, including petitioners (O. R. 99), respondent in the spring of 1935 offered petitioners $700 per share for their stock, and accompanied the offer with a threat to refuse to give the Steamship Company any

7. The record incorporates the printed record as filed in the court below on the prior appeal, but maintains the numbering of that record. Thus numbered, it commences at page 237 of the present record, and ends on page 240. References to this old record will be indicated by "O. R. ....", to the present record by "R. ....".

more traffic. Since this offer represented only the per share value of the company's tangible assets, and included nothing for the earnings record and earning power, petitioners refused the offer and suggested arbitration. Respondent, however, said it would not arbitrate the amount it would pay for something it wanted to buy, and threatened dissolution and the purchase of the boats for itself at the dissolution sale (O. R. 55).

To prevent the threatened dissolution, admittedly decided upon after petitioners refused the $700 offer, petitioners filed a first suit against the Steamship Company in July of 1935. March 18, 1936, the court below held that action premature because no corporate action had been taken. It did, however, emphasize respondent's fiduciary obligation resulting from its stock and actual control, said that respondent owed the duty "of the utmost of scrupulous fair dealing with the minority" interests. The court expressly held that the offer of $700 was not fair because it gave no consideration whatever to the earnings record of the company. Expressing grave doubt as to eventual results, the court expressly held that the dismissal was without prejudice to the right of petitioners to further relief.[8]

Dissolution was voted promptly after this decision. At the dissolution sale May 1, 1936 respondent bought the Steamship Company's boats and thereafter continued the business exactly as before. The dissolution yielded $604.17 per share, which petitioners received.

Petitioners then instituted this action. After pleadings were filed (following denial of respondent's motion to dismiss (O. R. 20)) the cause went to a Master to determine whether there could be any recovery. From the trial court's decree dismissing the action for want of equity, pursuant to the master's report, petitioners ap-

8. *Lebold* v. *Inland Steamship Company*, 82 F. (2d) 351.

pealed to the court below, which, on December 29, 1941, reversed the decree of dismissal.

The court then held that the dissolution was fraudulent; that respondent and its officials, failing to perform their duties as stockholders and directors of the Steamship Company, were faithless to that company and to the minority stockholders; and that the latter were powerless to help themselves. It announced that petitioners "rightfully complain of the breach of trust upon the part of defendant resulting in damage" (125 F. (2d) 369, 372).

The tenor and scope of that adjudication was further indicated by the court's statements: "It is perfectly apparent, indeed, the officers of defendant themselves indicate that their interest was to force dissolution so that *they might get rid of the minority interest* and take over the assets and business of the Steamship Company. *It is only with this elementary indisputable premise in mind that the proper answer to the controversy can be reached*" (125 F. 2nd, 369, 372, italics supplied).

> "In its strategic position of dominance, even though it was trustee for the minority stockholders, defendant warned plaintiffs that if they did not sell their stock, the Steel Company would end all business relations with the Steamship Company and that they must either sell their stock or see the Steamship Company go out of business. That these threats were not idle, that they were made with the ulterior motive, to bring duress to bear and to force plaintiffs, is now obvious. The business was never interrupted, never curtailed, never modified but continued without interruption." (Id., p. 373.)

Observing that the "strategic position of defendant was used solely for its own preferment," the court continued: "The Steamship Company had been organized many years before to transport freight for hire; it had transported only the freight of defendant; this it continues to do, the only difference being that *now the latter realizes all the*

profit which results from such transportation and the minority stockholders get none of it'' (id., p. 373, italics supplied).

The court then said that "the true rule for determination of the value of plaintiffs' interest" must include *"* * * value as a going concern * * *.* In twenty-five years the business of the Steamship Company has never ceased to be a going concern. It has been extremely prosperous. *It continues to be so without threat of interruption. In this going concern plaintiffs had an interest''* (id., p. 374, italics supplied).

Thereupon, the court considered the evidence of value *then* in the record. It considered material *only* that evidence which was based on the assumption that the business of the Steamship Company would continue after dissolution the same as theretofore. The court made it clear that the business to be valued was the business as it had been in fact for twenty-five years before, and continuously since, the dissolution. It said:

> "By taking over the assets and by continuing the properous business of its former *cestui* trust defendant has removed itself from the place where it is permissible for it to contend that there is no prosperous business. That there was value over and above physical assets is perfectly obvious from the fact that a prosperous business existed and is still being conducted; that plaintiffs, if they had not been deprived of their interest, would be still sharing in the returns from that business *and that at the present time all the profits of such are being enjoyed by defendant to the total exclusion of plaintiffs.''* (id., p. 374, italics supplied.)

With this in mind the court then concluded, after its discussion of the evidence as to value:

> "Thus it appears from both plaintiffs' and defendant's testimony that if the Steamship Company had been considered a going concern and if its business

might reasonably be expected to continue, the value of plaintiffs' stock would be in the neighborhood of $2,000 per share" (id. p. 375).

After observing that the question was "what the existence of the transportation business of that company, which defendant has wrongfully taken, is now fairly worth", the court said that the damages were to be measured by "what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiff's damages" (id., p. 375).

Upon remand, petitioners were entitled to and did rely on the opinions of the court below of March 18, 1936, and December 29, 1941, both of which, incidentally, indicated that the stock was worth $2000 per share and possibly more. At considerable trouble they obtained the services of three of the most competent valuation experts in the country who appeared before the trial court and applied the formula thus announced for determining the value of the shares to the Steamship Company. The trial court considered that evidence, and other evidence of value based on the assumption that there was going concern value to the Steamship Company's business, and found as a fact that the Steamship Company's stock was worth $2,350 per share.

The finding was based on appropriate findings of the trial court setting forth concisely the history and capital position of the company, the fact that there was no evidence of any market value as of May 1, 1936, and the following:

"7. The continuity of the earnings of Inland Steamship Company resulted in part from a policy, which had always prevailed, of maintaining a fleet less than sufficient to meet the normal requirements of Inland Steel Company, which customarily placed its excess traffic with outside carriers. In the execution of this policy, the most profitable cargoes, ore and limestone, were in the main given to Inland Steamship Company,

and the least profitable cargo, was shipped by outside carriers. This resulted in high utilization of its facilities and excellent earnings from the transportation business of Inland Steamship Company.

"8. On March 17, 1936, a short time prior to the dissolution of Inland Steamship Company, Inland Steel Company purchased an additional boat, a little smaller in size but faster, and generally comparable to the L. E. Block, the largest boat of the fleet of Inland Steamship Company. Continuously since the dissolution, this boat and the three boats formerly belonging to Inland Steamship Company have been operated by Inland Steel Company as part of the fleet carrying its ore, limestone, and coal. The former policy of Inland Steamship Company, of maintaining the fleet at less than sufficient capacity to meet the normal requirements of Inland Steel Company, has remained unchanged.

"9. The remarkable record of Inland Steamship Company during its twenty-five years of operations, the outstanding success of Inland Steel Company, the fact that the fleet of Inland Steamship Company was a captive fleet controlled by Inland Steel Company, the policy with respect to the size of the fleet providing transportation on the Great Lakes for the materials used in its mills, and the fact that a fourth boat was added in March, 1936, indicate conclusively that the prospective earnings of Inland Steamship Company, as of May 1, 1936, were certain and assured.

"10. The record discloses no steamship company engaged in the carriage of bulk freight on the Great Lakes with a record of earnings and dividends as favorable as that of Inland Steamship Company. The most successful steamship companies are the so-called captive companies—those owned or controlled by the steel companies. These carry the greater proportion of the ore and are by far the most profitable." (R. 141-2).

The following, from the opinion of the court below, sets forth the purported grounds for disagreeing with the trial court:

"The writer of this opinion has inclined toward the

view that the evidence amply supports the District Court's finding as to damages, but the majority believes that the allowance was too liberal and in determining the soundness of that conclusion it is well to keep in mind that this is a suit in equity where the evidence is preserved for our reviewing examination. The testimony of the various expert witnesses was based upon the historical facts appearing in the annals of the ship company and in the industrial and financial records of other corporations. Various theories of capitalization, based upon these facts, resulted in variant conclusions. The wide range of expert opinion covered valuations running from $224.90 to $3200 per share. Plaintiffs' witnesses gave emphasis to capitalization of past and projected earnings. Defendant's dwelt more largely upon earnings and capitalization of allegedly comparative carriers. It now directs our attention to the absence of contractual relation between the Steel Company and the ship company; the possibility of termination of all relationship and the probable earnings of the ship company, were the relationship dissolved, as a competitive contract carrier at prevailing rates. We think the court rightly considered the enlightening testimony offered by each party, but it is the conviction of the majority that too much credence was given to the rosy prognoses of plaintiffs and too little to the deterring elements cited by defendant. After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1350 each or an allowance of damages in excess of the difference between that value and the amount plaintiffs have received." (136 F. (2d) 876, 878.)

Subsequently, the possible lack of finality indicated by the last sentence was modified "by reducing plaintiffs' damages to the difference between what they have received and $1350 for each share of stock held by them, respectively, together with costs in the District Court and interest at the rate of 5% from May 1, 1936" (R. 223).

The fact is, however, that the foregoing quotation does not disclose what we understand to be the actual ground of the decision of the majority to fix the value of petitioners' stock at $1350 per share. At a conference after the decision the senior judge of the court below advised counsel for both parties that the figure of $1350 resulted from computations predicated upon an hypothesis evolved by the court. With the court's permission we addressed ourselves in our petition for rehearing filed in the court below to this proposition. We there stated our understanding of it in the following terms (R. 206):

> "It is taken as a premise that restrictions upon the activity of the controlling majority of a corporate enterprise should not go so far as to put the control in the minority. From this premise it is concluded that the majority might have determined, as matter of management policy, that the freight rates should have been greatly diminished, not, however, below the point where the Steamship Company would find it possible to earn a fair return upon the capital invested in the enterprise. It is our understanding that upon a formula adduced from this premise the conclusion was reached that the stock of the Steamship Company was worth not more than $1350 per share."

The hypothesis thus indicated is unsupported by any evidence in the record, was never urged by the respondent, was never at issue in the District Court, was not argued in the briefs of either party, and as noted, was not mentioned in the opinion of the court below.

Jurisdiction.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347 (a).

The opinion of the court below, originally filed June 16, 1943, was modified July 16, 1943, petitions of both par-

ties for rehearing filed July 8, 1943, were denied on that day, and the judgment of July 29, 1943, was entered *nunc pro tunc* as of July 16, 1943.

Questions Presented.

This petition presents the following questions:

1. An important question of federal law which has not been but should be passed upon by this court is the exact scope of permissible review in a non-jury case under Rule 52(a) of the Federal Rules of Civil Procedure which provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Upon this record this broad question is subdivided into the following parts:

(a) May a Circuit Court of Appeals consider itself the trier of the facts and proceed to a *de novo* consideration of the evidence in disregard of the findings of the trial court?

(b) May a Circuit Court of Appeals disregard the findings of the trial court where such findings are clearly supported by substantial evidence?

(c) May a Circuit Court of Appeals disregard the findings of a trial court, although they clearly are not against the weight of the evidence?

(d) May a Circuit Court of Appeals disregard the ultimate finding of the trial court, reach its own conclusion as to the ultimate fact, and enter judgment accordingly, although such conclusion is in obvious disagreement with the "evidentiary" or underlying findings of the trial court which are not found in any way to be erroneous?

(e) May a Circuit Court of Appeals determine the weight to be given to the evidence in a manner contrary

to that decided by the trial court, particularly where the trial court's decision is in accord with the law of the case as established by the Circuit Court of Appeals on a prior appeal?

(f) In doing all of the above (items (a) through (e)), may a Circuit Court of Appeals modify the ultimate finding of the trial court on the basis of evidence admitted over objection, and subsequently disregarded by the trial court, which evidence contradicted stipulated facts, and was offered in violation of respondent's stipulation not to introduce evidence in contradiction of such stipulated facts?

2. May a Court of Appeals determine the ultimate fact of value by computations based upon an hypothesis of what might have been a fair return upon the capital invested in an enterprise when such hypothesis (a) is clearly contrary to the undisputed facts on the evidence; (b) is unsupported by any evidence whatsoever; (c) was never urged by respondent as a factor to be considered; (d) was in no way an issue raised in the trial court; (e) was in no way raised as an issue in the Circuit Court of Appeals or argued in the briefs; (f) not mentioned in the opinion?

3. In reviewing a judgment entered in favor of minority stockholders in a proceeding to determine the value of the minority interest in a business wrongfully appropriated by a trustee, may a Circuit Court of Appeals consider as an element of value and give controlling weight to the possibility that the defaulting trustee by acts in breach of its fiduciary obligation might diminish the earning power and thereby depreciate the value of the business appropriated?

4. In such a proceeding, may the Circuit Court of Appeals, contrary to the holding of the trial court, give such weight to entirely hypothetical, speculative and apocryphal "elements of value" as to enable the trustee, an adjudicated wrongdoer, to make a profit out of its own wrong at the expense of its *cestuis que trustents*?

5. May a Circuit Court of Appeals consider and give

controlling weight to evidence properly disregarded by the trial court under the law of the case when, under the law of the case established on a previous appeal and expressly reaffirmed, such evidence is clearly incompetent and immaterial?

6. May a Circuit Court of Appeals, in reviewing the findings of the trial court, fail to correct the erroneous action of the trial court in giving any consideration to testimony not admissible under the law of the case and fail to direct a correction of the trial court's finding of value on the ground that it is against the law of the case established by the Circuit Court of Appeals on the prior appeal?

Reasons Relied on for Allowance of the Writ.

1. The first and most obvious reason is that the scope of review permissible under Rule 52(a) is an important question of federal law which has not been but should be passed upon by this court. The instant case is a glaring example of the shocking result possible because of the existing state of utter confusion and uncertainty upon this question. As will be shown under our next item, the decisions of the Circuit Court of Appeals are in hopeless conflict with each other and with the decision in the instant case. This situation alone indicates clearly the desirability of clarification that would result from a decision in this case.

But aside from these conflicts, no one can today say with certainty that the rule provides for the same scope of review as prevailed in equity prior to promulgation of the rule, or whether it should be construed to provide the narrower scope of review permitted in law cases. The difference in scope is so great that the situation loudly calls for the definitive elucidation that can come only from this court.

2. The decision of the court below with respect to the reach of its reviewing power is in conflict with the decisions of other circuit courts of appeals on almost all the points with respect to which such conflict could exist. The question was not really discussed by the court below and what it decided must be ascertained by examining what it did.

(a) In stating that "* * * this is a suit in equity where the evidence is preserved for our reviewing examination" —a statement not necessarily objectionable in itself—the court evidently considered that it was at liberty to try the case *de novo*, for that is what it did with respect to the valuation question—the only question remaining open after its opinion on prior appeal. In this the court is in conflict not only with its own prior decisions (*Webb* v. *Frisch*, 111 F. 2, 887, *Campana Corporation* v. *Harrison*, 114 F. 2, 400, *Wertz* v. *National City Bank*, 115 F. 2, 65 (cert. den., 311 U. S. 675)), but with decisions of other circuits (*Malloy* v. *New York Life Ins. Co.*, 1 Cir., 103 F. 8, 439; *Storley* v. *Armour & Co.*, 8 Cir., 107 F. 2, 499; *Andrew Jergens Co.* v. *Conner*, 6 Cir., 125 F. 2, 686).

(b) As the writer of the opinion noted, in effect dissenting, "* * * the evidence amply supports the District Court's finding as to damages". The soundness of this observation cannot be questioned, but in refusing to follow the rule that findings are not clearly erroneous, but must be followed, if supported by substantial evidence, the court has again run into conflict, not only with itself, *Mutual Life Insurance Co.* v. *Tormohlen*, 118 F. 2, 400, *McDaniel* v. *U. S.*, 108 F. 2, 450, but with decisions of other circuits, *Anglo-California National Bank* v. *Lazard*, 9 Cir. 106 F. 2, 693, cert. den. 308 U. S. 624, 84 L. E. 521, 60 S. Ct. 379; *Continental Oil Co.* v. *Jones*, 10 Cir., 113 F. 2, 557; *Missouri Pacific Trans. Co.* v. *George*, 8 Cir., 114 F. 2, 757, cert. den. 312 U. S. 681, 85 L. E. 1120, 61 S. Ct. 549; *Corbett* v. *Halliwell*, 2 Cir., 123 F. 2, 331; *Andrew Jergens Co.* v. *Conner*, 6 Cir., 125 F. 2, 686.

(c) Essentially all that the court did was to impose its own finding of the ultimate fact—the value of petitioners' shares—in lieu of the finding of this ultimate fact of the trial court. This leaves a glaring inconsistency between the finding of the ultimate fact and the evidentiary or underlying findings of the trial court. The asserted right so to do appears in conflict with *Storley* v. *Armour & Co.*, 8 Cir., 107 F. 2, 499; *Manning* v. *Gagne*, 1 Cir., 108 F. 2, 718; *McGee* v. *Nee*, 8 Cir. 118 F. 2, 543; *U. S.* v. *State Street Trust Co.*, 1 Cir. 124 F. 2, 948; *Andrew Jergens Co.* v. *Conner*, 6 Cir., 125 F. 2, 686.

(d) In holding that "* * * too much credence was given to the rosy prognoses of plaintiffs and too little to the deterring elements cited by defendant", the court was determining the weight to be given to the evidence. Here again the court is in conflict with itself, *Webb* v. *Frisch*, 111 F. 2, 887, and with the decisions of other circuits, *Anglo-California National Bank* v. *Lazard*, 9 Cir., 106 F. 2, 693, cert. den. 60 Sup. Ct. 379; *Storley* v. *Armour & Co.*, 8 Cir., 107 F. 2, 499; *Occidental Life Ins. Co.* v. *Thomas*, 9 Cir., 107 F. 2, 876 (in Circuit Judge Haney's concurring opinion).

3. The decision of the court below as to the scope of its reviewing examination constitutes the decision of a Federal question in a way probably in conflict with applicable decisions of this court. If Rule 52(a) is deemed to be the formulation of the former law rule, the setting aside of the finding of the trial court on value could not be sustained because it cannot be said that such finding is unsupported by any substantial evidence (*McCaughn* v. *Real Estate Co., et al.*, 297 U. S. 607). On the other hand, if Rule 52(a) is essentially a restatement of the former equity rule, then the decision is wrong under *Adamson* v. *Gilliland*, 242 U. S. 350; *Furrer* v. *Ferris*, 145 U. S. 132; *Warren* v. *Keep*, 155 U. S. 265; *Alabama Power Company* v. *Ickes*, 302 U. S. 464.

4. The court below has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision. This observation is twice justified:

(a) The opinion indicates the extraordinary significance attached by the court below to the "deterring elements cited by defendant", and that the principal deterring element was "the possibility of termination of all relationship [between the Steel Company and the Steamship Company], and the probable earnings of the Steamship Company, were the relationship dissolved, as a competitive contract carrier at prevailing rates". The computations of earnings upon this hypothesis were introduced over dejection and in violation of respondent's stipulation not to introduce evidence contradictory to stipulated facts (R. 190). Even if respondent wished to offer evidence in violation of such a stipulation, the trial court properly disregarded the evidence, and the court below was just as much bound by the stipulation as were the parties. From the opinion it appears, however, that not only did the court below consider such evidence but gave to it controlling weight.

(b) Oddly enough, however, this does not turn out to be true, for the ultimate finding of the court below was based upon computations drawn from a hypothetical concept clearly erroneous, clearly inadmissible under the evidence, never urged by the respondent, never an issue in the District Court, not argued in the briefs of either party, and not mentioned in the opinion. Any litigant should be justified in thinking himself entitled to relief from that kind of adjudication of important interests.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify

and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem just and proper.

Respectfully submitted,

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SILAS H. STRAWN

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FRANKLIN M. WARDEN

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ARTHUR D. WELTON, JR.

Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals appears at 136 F. (2d) 876 (Advance Sheets, September 6, 1943); and is to be found at page 172 of the record. The judgment of the court below is to be found at page 176 of the record. The District Court filed no opinion. Its findings of fact and conclusions of law are at pages 140 to 142 of the record.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 28 U. S. C. 347 (a).

The opinion of the court below, originally filed June 16, 1943, was modified July 16, 1943, petitions of both parties for rehearing filed July 8, 1943 were denied on that day, and the judgment of July 29, 1943 was entered *nunc pro tunc* as of July 16, 1943.

III.

Statement.

The facts are thought to be sufficiently stated in the petition.

IV.

Specification of Errors.

The errors which petitioners will urge if the writ of certiorari is granted are that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In construing that Rule 52(a) permitted it to proceed to a *de novo* consideration of the evidence in disregard of the findings of the trial court.

2. In disregarding the findings of the trial court, although such findings are clearly supported by substantial evidence.

3. In disregarding the findings of the trial court, although they clearly are not against the weight of the evidence.

4. In disregarding the ultimate finding of the trial court, reaching its own conclusion as to the ultimate fact and entering judgment thereon, although such conclusion is in obvious disagreement with the evidentiary findings of the trial court, which were not found by the Circuit Court of Appeals to be erroneous in any way.

5. In determining the weight to be given to the evidence in a manner contrary to that decided by the trial court, although the trial court's decision is in accord with the law of the case as established by the Circuit Court of Appeals on a prior appeal.

6. In modifying the ultimate finding of the trial court on the basis of evidence admitted over objection, disregarded by the trial court, which evidence contradicted stipulated facts and was offered in violation of respondent's stipulation not to introduce evidence in contradiction of such stipulated facts.

7. In determining the ultimate fact of value, by computations based upon an hypothesis of what might have

been a fair return upon the capital invested in an enterprise, when such hypothesis (a) is clearly contrary to the undisputed facts on the evidence; (b) is unsupported by any evidence whatsoever; (c) was never urged by respondent as a factor to be considered; (d) was in no way an issue raised in the trial court; (e) was in no way raised as an issue in the Circuit Court of Appeals or argued in the briefs; (f) is not mentioned in the opinion.

8. In considering the possibility that the defaulting trustee by acts in breach of its fiduciary obligation might diminish the earning power and thereby depreciate the value of the business appropriated, to be an element of value of controlling weight.

9. In giving such weight to entirely hypothetical, speculative and apocryphal "elements of value" as to enable the trustee, an adjudicated wrongdoer, to make a profit out of its own wrong at the expense of its *cestuis que trustents.*

10. In considering and giving controlling weight to evidence properly disregarded by the trial court under the law of the case established by it on a previous appeal and expressly reaffirmed, when, under that law, such evidence is clearly incompetent and immaterial.

11. In failing to correct the erroneous action of the trial court in giving any consideration to testimony not admissible under the law of the case, and to direct a correction of the trial court's ultimate finding of fact on the ground that it is against the law of the case established by the Circuit Court of Appeals on the prior appeal?

SUMMARY OR ARGUMENT.

I.

The underlying question in this case was whether or not respondent had breached the fiduciary obligations imposed upon it as a result of its controlling interest in and actual management of the Steamship Company. The decision on the first appeal that respondent had been a faithless trustee and had appropriated the Steamship Company's business for itself to the exclusion of the minority stockholders, including petitioners, necessarily involved the decision that respondent was liable to the petitioners for their share of the value of the business thus appropriated. The question of value was the only question open upon remand of the case after the first appeal.

The court below erred, on appeal from the trial court's determination of value, by apparently deciding that the measure of respondent's liability was not the value of the business which respondent appropriated, but the supposed value of a different business—a supposition that could be entertained only by disregarding the findings of the trial court, the evidence and the law of the case, the latter having been expressly reaffirmed by the court below on the second appeal.

In fact, the actual base for the appellate court's finding of value was a computation predicated upon an hypothesis which is unsupported by the evidence, is against the clear weight of the evidence, was never urged by respondent as a factor to be considered, was not an issue in the trial court, and not argued in the briefs, and is not mentioned in the opinion of the court below.

Since the court below expressly reaffirmed the law of the case as previously announced by it, it is believed that

the erroneous result was caused by the complete misapprehension by the Circuit Court of Appeals of the scope of review permissible to it under Rule 52 (a) of the Federal Rules of Civil Procedure.

II.

The instant case is but one example of the necessity for clarification of the meaning of Rule 52 (a). Decisions of the various Circuit Courts of Appeals since promulgation of the rule clearly reveal confusion and conflict on the question of the scope of review under this rule. It is not certain whether the rule is the former law rule or the former equity rule, or lies somewhere between. The interpretation of many courts that it requires application of the so-called "substantial evidence" rule is negatived by other decisions. Some courts assert that findings will be set aside if against the clear weight of the evidence, but others say they will not be disturbed if supported by evidence, or in some cases by substantial evidence (although possibly against the "clear weight"). Some courts undertake to pass on the weight to be given to the evidence, and others deny this power. Some consider consistency between the "evidentiary" and ultimate findings necessary, and some do not.

Until this obscurity is removed, and it can be removed only by this court, not only the petitioners but other litigants must conclude that their rights are not to be determined by justice under law but by the personal notions of the particular tribunals who sit in review upon matters of great importance to them.

The petition presents this important question of federal law and seeks review of a decision conflicting, in principle at least, with decisions of this court, conflicting with decisions of other Circuit Courts of Appeals, and revealing action that departs from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this court's power of supervision.

ARGUMENT.

I.

The Error of the Court Below on the Substantive Question in the Case Was the Result of the Court's Misapprehension of the Scope of Permissible Review Under Rule 52 (a).

An understanding of the extraordinarily erroneous action of the court below requires brief consideration of the substantive question in this case. Decision that the petitioners were entitled to recover necessarily involved establishment of the measure of recovery: once it was decided that respondent had appropriated the Steamship Company's business, it was clear that respondent was liable to petitioners for the value of their pro rata share of that business. Our major quarrel with the decision below is that it says, in effect, that respondent need not pay petitioners for their share of the business respondent took, but of a different business of far less value.

On the present appeal the only question was the proper application of the measure of recovery established as the law of the case. The court below reaffirmed that law, but disregarded the findings of the trial court in applying that law, thus holding the findings to be clearly erroneous. Such disregard, and the consequent holding, are erroneous because they assume a right in the reviewing court to try the case *de novo* and make its own findings without regard to the findings of the District Court, or, for that matter, without regard to the evidence.

The issue now must be taken to be, what is the scope of review permitted by Rule 52(a), for the court expressly refused to alter its previous announcements either on the basis of a reconsideration of the applicable law or on the

basis of the evidence introduced at the valuation hearing. While the power to depart from the law of the case previously established does exist, it is an extraordinary power to be exercised rarely and only under extraordinary circumstances.[9] This record reveals no circumstances of this nature. The court below was right in refusing to modify its earlier announcement.

It was obvious under that announcement, and the court expressly stated, that "The damages to be allowed are the difference between what plaintiffs have received from a sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' damages" (125 F. 2, 369, 375).

The Circuit Court of Appeals had twice indicated it thought the shares worth about $2,000 each. In *Lebold* v. *Inland Steamship Company*, 82 F. (2d) 351, 352, the court, referring to the earnings record for the nine years 1925 to 1934, said: "If we could capitalize the earnings upon the basis of a 6 per cent. return, the value of the shares during those nine years would have been over $2,000." In the first appeal in the instant case the court, examining the

[9] Examples of such circumstances are found in *Johnson* v. *Cadillac Motor Car Co.*, 2 Cir., 261 Fed. 878, where the court reversed itself because of the decision after its opinion on prior appeal by the New York Court of Appeals in the famous case of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050; in *Messenger* v. *Anderson*, 225 U. S. 436, where the Court of Appeals for the Sixth Circuit reversed its construction of a will because of an intervening different construction of the same will by the Supreme Court of Ohio, *Anderson* v. *United Realty Co.*, 79 Ohio St. 23, 86 N. E. 644; and *Luminous Unit Company* v. *Freeman-Sweet Company*, 7 Cir., 3 F. (2d) 577, where the court below reversed itself because of the intervening opinion of this court in *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 66 L. Ed. 475, 42 S. Ct. 196.

testimony as to value then in the record, said (125 F. (2d) 369, 375): "Thus it appears from both plaintiffs' and defendant's testimony that if the Steamship Company had been considered a going concern, and if its business might reasonably be expected to continue, the value of plaintiffs' stock would be in the neighborhood of $2,000 per share."

The question whether "its business might reasonably be expected to continue" was repeatedly answered in the opinion. The court there said, among other things, "A prosperous business existed and is still being conducted. It [the Steamship Company] has been extremely prosperous. It continues to be so without threat of interruption. In this going concern plaintiffs had an interest" (125 F. 2, 369, 374). The issue was accurately stated to be "what the existence of the transportation business of that company [the Steamship Company], which defendant has wrongfully taken, is now fairly worth" (125 F. (2d) 369, 374).

The law of the case is, therefore, that respondent, a faithless trustee, wrongfully appropriated a valuable business and must pay to petitioners the value of their pro rata share of the business so appropriated. The soundness of this conclusion is not open to question.

Proceeding in accordance with these clear announcements, petitioners obtained the services of three outstanding valuation experts who meticulously followed the standards laid down by the court. Their studies led them to capitalize projected earnings at rates of capitalization shown by the public's evaluation in the financial markets of securities deemed suitable standards for comparison. Extensive statistical studies were introduced. These not only set forth pertinent financial data, but give particular attention to the following factors: The economic cycle, general business trends, trends in the steel industry generally, the brilliant upward trend in the affairs of the

Inland Steel Company, the improving earnings of the Steamship Company during the period from the valley of the depression in 1932 to the valuation date, May 1, 1936, and its long record of successful earnings and substantial dividend payments (Plffs. Ex. D-1-D-13; R. 101-115, 26, 37, 41, 43, 66, 67, 69, 100). Plaintiffs' Exhibit D-1, a physical exhibit, is by itself a brilliant brief on valuation, containing 33 charts with supporting tables.

The author of this exhibit, Paul B. Coffman, Vice-President of Standard & Poor's Corporation, ultimately selected from the list of common stocks dealt in on the New York Stock Exchange all of those stocks of companies which, like the Steamship Company, reported earnings and paid dividends during the three years 1933, 1934 and 1935. For this purpose he found an average capitalization by the public of the earnings of those companies at the rate of 6.9% (Plffs. Ex. D-1, Chart 32, R. 25). Applying a 7% rate of capitalization to his estimate of future earnings of the Steamship Company, this witness testified that the petitioners' stock was worth not less than $3,000 per share (R. 25).

David Friday, petitioners' second witness, measured the value of the Steamship Company stock in terms of respondent's stock (listed on the New York Stock Exchange) on a comparison of earnings for earnings and dividends for dividends. By applying the public's rate of capitalization of those items expressed in terms of the contemporary market price of respondent's stock, he concluded that the stock of the Steamship Company was worth not less than $3100 per share (R. 40-46).

The third witness, William M. Hammond, particularly experienced in the valuation of securities of transportation enterprises (R. 62, 63), concluded from his exhaustive studies that the stock was worth not less than $3200 per share (R. 69). Petitioners' own conclusion urged upon

the courts below was that the most accurate yardstick was provided by respondent's stock, and that the final conclusion as to value should be Dr. Friday's figure of $3100 per share. This was a valuation method expressly approved in *Wisconsin Gas & Electric Co.* v. *Wisconsin Tax Commission*, 221 Wis. 487, 266 N. W. 186 (1936).

The only evidence offered by respondent which the trial court appears to have considered was that of respondent's valuation expert, Ralph E. Badger, who concluded that the stock of the Steamship Company, as stock in the business conducted both before and after the dissolution, was worth from $1530 to $1920 per share (R. 96). This witness's conclusions were predicated only upon the past earnings record (R. 88), but without adjustment for a nonrecurring expense item of bond interest which, during the years in question, amounted to substantial sums (Ptffs. Ex. D-1, Appendix Table No. 1). To this erroneous base figure he applied the old "rule of thumb" capitalization rate of ten times earnings, finding support therefor only in the uncertain and widely varying capitalization rates of a few Great Lakes carriers engaged in the competitive field (R. 88). He himself testified that the risk factor was greater for such companies than for a captive carrier like the Steamship Company (R. 95). The error of this selected capitalization rate was further demonstrated by his own book* in which he pointed out that "leading issues of the more stable earnings type showed a ratio of about ten times earnings in the early 1920s, but have since declined and tended to move between fifteen and eighteen times earnings in recent years."

The trial court's ultimate finding of value was predicated upon an arithmetical mean between a value of $1500 per share and $3200 per share, or $2350.

The trial court's disregard of the other valuation evi-

* Ralph E. Badger, Investment Principles and Practices, Third Edition, 1941, page 82.

dence offered by respondent was clearly required by the law of the case. This evidence consisted largely of computations and studies purporting to show the value that would be ascribed to the stock of the Steamship Company if it earned upon its invested capital a rate of return comparable to the return earned by companies engaged in transportation on the Great Lakes in the competitive field (Def. Exs. D-7, D-8; R. 124, 125, 91, 92). Some of the underlying computations are demonstrably unsound on the basis of other evidence also introduced by respondent (R. 79, 80), particularly the assumption that the Steamship Company, if engaged in the competitive field, would have received its pro rata share according to tonnage of all of the traffic available to both captive and competitive fleets (Def. Ex. D-9, R. 126, 94, 95). As the assumption is demonstrably untrue, computations predicated thereon could not be competent. Nor is it permissible to consider what would be the value of petitioners' stock if the Steamship Company were engaged in the competitive field, since the Steamship Company had never, either before or after the dissolution, been engaged as anything other than a captive fleet. Yet this is the hypothetical "deterring factor" heavily relied on in the published opinion as the ground for diminishing the amount awarded by the District Court.

Two other items in the paragraph quoted from the opinion need brief comment. It is there stated that "the wide range of expert opinion covered valuations running from $224.90 to $3200 per share." This is erroneous. The lowest valuation, based on the assumption of a continuing business as of May 1, 1936, was that of respondent's witness Badger, who testified to a value "somewhere between $1534.90 and $1918.64" (R. 96). No valuation was as low as $224.90 per share on any basis. The lowest valuation "on a liquidating basis" was $604.17, the amount resulting from the forced dissolution of the Steamship Company (R. 94).

The court says that respondent "*now* directs our attention to the absence of contractual relation between the Steel Company and the ship company." (Italics supplied.) That is no point that respondent brought up for the first time on this last appeal. It has been a stipulated fact in this litigation from the outset (O. R. 194). It has been one of the main points urged by respondent at all points in this litigation. There is in it nothing either new or useful.

Upon this record, particularly in view of the court's announcement on two previous occasions of values of $2,000 a share or more, the conclusion of the majority of the court below that the "allowance was too liberal" is incomprehensible. It is believed that the majority could have come to such a conclusion only as the result of the complete misapprehension of the scope of review permitted under Rule 52(a). It, perhaps, cannot be said that the utter confusion with respect to that question found in the books justifies the misapprehension of the court below, but it is possible that it explains that misapprehension.

The fundamental error of the judgment below is that it does not require the respondent, a trustee, to pay the fair value of the property which it wrongfully took away from its *cestuis que trustents*, but for something else of less value. The course by which the court below arrived at this grievous substantive error is one that would be barred by the proper interpretation of Rule 52(a).

II.

The Question of the Scope of Review on Findings of Fact Under Rule 52 (a) Is in Such a State of Confusion as to Demand Settlement by This Court.

Judge Learned Hand has aptly observed that "Much confusion has arisen, as we apprehend, from the varying language which judges have used to describe what has now

become the rubric of Rule 52(a)." (*Petterson Lighterage & Towing Corp.* v. *New York Central R. R. Co.*, 2 Cir., 126 F. (2d) 992, 995.) The decisions of the Circuit Courts of Appeals since promulgation of Rule 52(a) reveal clearly that the judges are not only still using "varying language", but are adopting various interpretations. Rule 52(a) may indeed be a rubric, but its meaning is thus far obscured by the welter of decisions.

No one can say with certainly whether Rule 52(a) is a statement of the former rule applicable in appeals in law cases, or should be considered the adoption of the former rule in equity cases. The expressed intention of the Advisory Committee indicates the latter. (Note to Rule 52.) Although the Committee's note states only that the rule "*accords with* the decisions on the scope of review in modern equity practice," Judge Charles E. Clark acknowledges that he was outvoted on his advocacy of extending the law review to all cases. (Clark and Stone, Review of Findings of Fact (1937), 4 U. Chi. L. Rev. 190). The language of Rule 52(b), which provides that "the question of the sufficiency of the evidence to support the findings" may be raised on appeal without prior technical requirements in the matter of objections and a motion for judgment, is susceptible of a construction in line with the former law rule. At least one commentator has pointed out that Rule 52 is not unambiguous. (Ilsen, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure* (1939), 24 Minn. L. Rev. 1, 34.)

The decisions follow no definite trend. The Fourth Circuit has three times stated that the rule "is but the formulation of a rule long recognized and applied by courts of equity." *Guilford Construction Co.* v. *Biggs*, 102 F. (2d) 46, 47; *Stonega Coke & Coal Co.* v. *Price*, 106 F. (2d) 411, 417; *U. S.* v. *Appalachian Electric Power Co.*, 107 F. (2d) 769, 779. The Eighth Circuit seems to identify the rule with the former rule in law cases. (*Luzier's, Inc.* v. *Nee*,

106 F. (2d) 130, 135; *Storley* v. *Armour & Co.*, 107 F. (2d) 499, 513.) Decisions of the Fifth and Seventh Circuits are equivocal. (*McKeever* v. *Fontenot*, 5 Cir., 104 F. (2d) 326, 329; *Sundt* v. *Turman Oil Co.*, 5 Cir., 107 F. (2d) 762, 764; *McDaniel* v. *U. S.*, 7 Cir., 108 F. (2d) 450, 452.)

When the courts have come to determine just what is meant by "clearly erroneous," the disparity is even more apparent. Many have proceeded upon the so-called "substantial evidence" rule. An example of this is found in *Mutual Life Insurance Co.* v. *Tormohlen*, 7 Cir., 118 F. (2d) 163, 166, where the court considered that it was "limited in its investigation to an ascertainment of the existence of substantial evidence sufficient to support the findings." (id., p. 166.) Substantially similar statements are found in *Sundt* v. *Turman Oil Co.*, 5 Cir., 107 F. (2d) 762, 764; *McDaniel* v. *U. S.*, 7 Cir., 108 F. (2d) 450, 452; *Continental Oil Co.* v. *Jones*, 10 Cir., 113 F. (2d) 557, 564; *Missouri Pacific Trans. Co.* v. *George*, 8 Cir., 114 F. (2d) 757, 759, cert. den., 312 U. S. 681, 85 L. E. 1120, 61 S. Ct. 549; *Corbett* v. *Halliwell*, 2 Cir., 123 F. (2d) 331; *Andrew Jergens Co.* v. *Conner*, 6 Cir., 125 F. (2d) 686, 689.

On the other hand, it has been observed that "the 'substantial evidence' rule no longer applies" and the question is whether or not the finding is "clearly erroneous," (*Manning* v. *Gagne*, 1 Cir., 108 F. (2d) 718, 720, 721), and in *State Farm Mutual Auto Insurance Co.* v. *Bonacci*, 8 Cir., 111 F. (2d) 412, 415, the court cited with approval and applied a statement from Simkins Federal Practice (3rd Ed. p. 488) that under Rule 52 (a) the appellate court is "not limited to the mere question whether there is any substantial evidence to support them [the findings], but may set them aside if against the clear weight of the evidence."

On the question of the power of reviewing courts to weigh the evidence, there is again a wide divergence of views. The Fourth Circuit Court of Appeals, in a case involving important questions, assumed a broad scope of

review expressed in the statement: "We have felt it particularly necessary to carefully review the evidence in the case on which the findings of the district judge are based." (*United States* v. *Appalachian Electric Power Co.*, 107 F. (2d) 769, 779.) In *Anglo-California National Bank* v. *Lazard*, 9 Cir., 106 F. (2d) 693 (cert. den., 308 U. S. 624, 84 L. E. 521, 60 S. Ct. 379) the court, after concluding that there was substantial evidence to support the findings, observed that "the weight to be given to the evidence was for the trial court and not for this court." (id., p. 703.) Judge Haney, specially concurring in that case, was content to say that he thought the findings were not "clearly erroneous." (id., p. 706.) This same judge, again concurring specially, in *Occidental Life Insurance Co.* v. *Thomas*, 9 Cir., 107 F. (2d) 876, 879, said: "I believe that the conclusion of the majority is reached by weighing the evidence, and doubt that we have any such power * * *. Questions as to the weight of the evidence are not to be decided by us."

And in *Manning* v. *Gagne*, 1 Cir., 108 F. (2d) 718, 720, the court said: "We are not called upon here to decide whether there was substantia evidence warranting findings by the judge different from those which he made, but only whether his findings are clearly erroneous within Rule 52(a) * * *". This idea also finds expression in *Andrew Jergens Co.* v. *Conner*, 6 Cir., 125 F. (2d) 686, 689, where the court held that the findings were conclusive upon it "* * * no matter how convincing the argument, that upon the evidence the findings should have been different, unless there is no substantial evidence to support them."

In *Webb* v. *Frisch*, 7 Cir., 111 F. (2d) 887, 888, the court observed: "We cannot say that a finding of the fact of prior use is 'clearly erroneous' merely because we might have entertained some doubt about the quantum of evidence." A different approach is suggested by *McGee* v. *Nee*, 8 Cir., 113 F. (2d) 543, 546, where the court ob-

served: "* * * the findings of ultimate facts in a jury-waived case, unless shown to be unsupported by evidence or clearly erroneous in view of the evidence, are conclusive on appeal and an appellate court cannot revise them but can only determine whether they support the judgment."

The foregoing exemplifies the conflicts which exist among the decisions. Many other cases construing Rule 52(a) also indulge in "varying language", reveal further confusion, and are in many instances conflicting in principle as to the exact scope of review. They are collected in the footnote.[10]

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[10] *Aetna Life Ins. Co.* v. *Kepler*, 8 Cir., 116 F. (2d) 1, 5; *Atlas Beverage Co., et al.* v. *Minneapolis Brewing Co.*, 8 Cir., 113 F. (2d) 672, 675: *Campana Corp.* v. *Harrison*, 7 Cir., 114 F. (2d) 400, 405, applying the "substantial evidence" rule; *Equitable Life Assur. Soc.* v. *Irelan*, 9 Cir., 123 F. (2d) 462, 464; *Fleming* v. *Palmer, et al.*, 1 Cir., 123 F. (2d) 749, 751, where the court held findings clearly erroneous because against the clear weight of the evidence, and said, "It does not suffice if it is supported by evidence"; *Gary Theatre Co.* v. *Columbia Pac. Corp., et al.*, 7 Cir., 120 F. (2d) 891, 892; *Katz Underwear Co.* v. *U. S.*, 3 Cir., 127 F. (2d) 965, 966, findings may be set aside "if it clearly appeared that the court misapprehended the evidence"; *Kuhn* v. *Princess Lida of Thurn and Taxis*, 3 Cir., 119 F. (2d) 704, 705, where the court said. "So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity"; *Malloy* v. *N. Y. Life Ins. Co.*, 1 Cir., 103 F. (2d) 439, 443; *Murray* v. *Noblesville Milling Co.*, 7 Cir., 131 F. (2d) 470, 474; *Nichols* v. *Minn. Mining & Mfr. Co.*, 4 Cir., 109 F. (2d) 163, 164; *Reinstine* v. *Rosenfield*, 7 Cir., 111 F. (2d) 892, 895; *Schneiderman* v. *U. S.*, 9 Cir., 119 F. (2d) 500, 502; *U. S.* v. *Armature Rewinding Co.*, 8 Cir., 124 F. (2d) 589, 591, holding that an ultimate finding was not binding if it "is contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings"; *U. S.* v. *State Street Trust Co.*, 1 Cir., 124 F. (2d) 948, 950, indicating that the court thought the rule the same as that relating to findings of fact of the Board of Tax Appeals as established by this court's decision in *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Wittmayer* v. *U. S.*, 9 Cir., 118 F. (2d) 808, 811.

While the differences are not always of substance, the conclusion is inescapable that there is very serious conflict in principle. So much so that a litigant whose case is under review cannot know what is the meaning of "clearly erroneous" until it has been decided for his case. The unsatisfactory character of such a situation needs no enlargement. The case at bar is one of the most unfortunate of its results.

It may be pointed out that a valley of indecision lies between those cases which apply the "substantial evidence" rule to support the findings, and those cases which reject the findings because they are against the "clear weight of the evidence." Does the "substantial evidence" rule mean, supported by the "clear weight of the evidence," or, as some courts have indicated, may a finding be against the clear weight of the evidence and yet sustained because supported by "substantial evidence"?

Does the solution of such dilemmas require the appellate court to weigh the evidence, or must it accept the weight given to it by the trial court—or must it do that in some types of cases and not in others? To what extent are the answers to these questions applicable to findings of ultimate fact or inferences and conclusions? Are the appellate courts free with respect to ultimate facts, inferences and conclusions, whether they be in accord with the findings of the trial court on the "evidentiary" facts or not? If this be so, can it not fairly be said that all of the "varying language" indicating restriction upon the scope of review (not to mention Rule 52(a) itself) is mere fiction designed only for the purpose of disguising the fact that the appellate court is in fact reviewing the case *de novo?*

The action of the court below in the instant case raises all of these questions. The disregarded findings of the trial court are unquestionably supported by substantial evidence; in fact, it cannot be said by any stretch of the imagination that they are against the "clear weight of the evidence." The appellate court's finding of the ulti-

mate fact of value is in conflict with the undisturbed "evidentiary" findings of the trial court. Certainly, the court below was not content to refrain from inquiring whether there was evidence warranting findings different from those made by the trial court. It has thus not only asserted the prerogative of complete power over the "ultimate facts" and conclusions, but has in effect reviewed the record as though it were trying the case *de novo*.

It is submitted that manifest error has been committed; and that it is a result of the lack of clarity as to the scope of review permissible under rule 52(a). Until the enormous obscurity concealing its true meaning is resolved by this court, not only the petitioners but other litigants must conclude that their rights are not to be determined by justice under law but by the personal notions of the particular tribunals who sit in review upon matters of great importance to them.

CONCLUSION.

In conclusion it is respectfully submitted that the writ prayed for should be granted (1) because of the necessity for a clarification of the meaning of Rule 52(a); (2) because the action of the court below is in conflict with the decisions of other Circuit Courts of Appeals as well as, in principle, with decisions of this court; (3) because the action of the court below departs from the usual and accepted course of judicial proceedings to such an extent that the supervisory power of this court most certainly should be exercised, and (4) because the many errors committed by the court below permit the respondent, a faithless trustee, to profit by its own wrong at the expense of its beneficiaries, these petitioners.

Respectfully submitted,

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